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IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1962

NO. 640

ARNOLD E. EDENS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

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Petitioner prays that a Writ of Certiorari be issued to review the judgment of the Supreme Court of the State of Arkansas, entered in the above entitled case on May 28, 1962.

OPINIONS BELOW

No opinion was rendered by the Circuit Court for the County of Greene, State of Arkansas, but the judgment and opinion of the Supreme Court of the State of Arkansas, are appended hereto.

JURISDICTION

The judgment of the Supreme Court was pronounced on May 28, 1962, and a petition for rehearing was denied on September 10, 1962. The jurisdiction of this Court is invoked under 28 USCA Section 1257 (3).

Article 7, Section 4 of the Constitution of the State of Arkansas, of 1874 provides: "The Supreme Court, except in cases otherwise provided by this constitution, shall have appellate jurisdiction only, which shall be co-extensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law in equity; and, in the aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, probation, mandamus, and quo warranto, and, other remedial writs, and to herein determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs."

The legislature provided for such appeals in criminal cases by the enactment of Sections 43-2701-43-2739 inclusive of the Arkansas Statutes 1947 of the State of Arkansas.

From the final judgment of the Supreme Court of the State of Arkansas, after the taking of such an appeal, from the Circuit Court for Greene County, Arkansas, petitioner has no further appellate remedy under the laws of the State of Arkansas. The Arkansas law provides that entry of the final judgment occurs upon denial of the petition for rehearing. The petition for rehearing was denied September 10, 1962.

QUESTIONS PRESENTED

Broadly stated, the questions presented are these: Does the conviction for false pretenses unlawfully abridge the right of the petitioner under the 5th, 6th, and 14th Amendments to the Constitution of the United States?

Stated more specifically:

1. Does the fact that the petitioner was deprived of a preliminary hearing prior to or subsequent to the filing of the information abridge his rights under the Constitution? The record shows that the petitioner was not granted a preliminary hearing as set out in the motion to quash the information, Item #6. (R. 9) The right to the preliminary hearing was not waived by the petitioner in any manner and was also presented to the Supreme Court of Arkansas. Does the denial by the State Court, unduly limit the Constitutional right of a preliminary hearing and abridge the rights of the petitioner?

2. Does the denial by the State Trial Court and the Arkansas Supreme Court to the right of indictment by Grand Jury and not subjected to a charge by information abridge the rights of petitioner under Amendment 5 to the Constitution of the United States? When the right to indictment or hearing before a Grand Jury was not waived by the petitioner, but demanded.

3. Does the use of members of the Jury panel who were either called and questioned or actually served on the jury during another trial of the petitioner at the same term of court abridge the rights of the petitioner under Amendment Six to the United State Constitution?

4. Does the allowance by the State Court for the State

to introduce into evidence exhibits not furnished in response to a petition for Bill of Particulars by the petitioner abridge the privileges and immunity of the petitioner and deny the petitioner the equal protection of the laws under Amendment 14 to the United States Constitution?

5. Does the refusal by the State Court to permit counsel for the petitioner to inquire of the prosecuting witness of his connections with the corporation allegedly headed by the petitioner abridge the privileges and immunity of the petitioner and does such action by the State Court deny to the petitioner the equal protection of laws under the 14th Amendment to the United States Constitution?

6. Does the denial by the State Court to permit the petitioner to subpoena records of the prosecuting witness as requested in the motion for a Bill of Particulars and requested at the time the State Court permitted the State in front of the jury to subpoena records of the corporation of the petitioner abridge the privileges or immunity of petitioner and deny the petitioner the equal protection of the laws under Amendment 14 of the United States Constitution?

7. Does the fact that the State Court without an admonishment to the jury permit the prosecuting attorney to state before the jury, "would like for the Sheriff to go down there before they not disappear," pertaining to the records of the corporation abridge the privileges and immunity of the petitioner or deny to him the equal protection of the laws under Amendment 14 to the United States Constitution?

8. Does the denial by the State Court for petitioner's counsel to examine the prosecuting witness regarding an audit or accounting on cross examination by petitioner's counsel regarding witness's transactions with Investors Stock Fund and the refusal to cause the prosecuting witness to produce records pertaining to the Investors fund abridge the petitioner's privileges and immunity and deprive petitioner of the equal protection of the laws under Amendment 14 to the United States Constitution?

9. Does the denial by the State Court of petitioner's counsel's rights to cross examine prosecuting witnesses regarding their creditability and character, after the State had put on character witnesses on behalf of the prosecuting witnesses abridge the privileges and immunity of the petitioner and deny to him equal protection of the laws under Amendment 14 of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The due process clause and equal protection clause of the 14th Amendment to the United States Constitution. The right to a trial by an impartial jury and the right to have compulsory process for obtaining witnesses of the 6th Amendment to the United States Constitution. The due process clause of the 5th Amendment to the United States Constitution.

STATEMENT OF THE CASE

1. PROCEDURAL HISTORY OF THE CASE

The petitioner was charged with violation of Section 41-1901 Arkansas Statutes of the State of Arkansas, which provides that the obtaining of personal property, right of action or other valuable thing or effects whatever by a token in writing with intent to defraud or cheat another is a criminal offense and a felony. A trial was had on May 26, 1961, with a jury. This trial resulted in a conviction of the petitioner and a sentence of 11 years in the Arkansas State Penitentiary.

The Supreme Court of Arkansas, the superior appellate court of the State, affirmed the judgment of conviction on May 28, 1962, and denied a petition for rehearing on September 10, 1962. Petitioner has no further remedy for appellate review in the State Courts of Arkansas.

2. THE FACTS MATERIAL TO THE QUESTIONS PRESENTED.

John W. Recker and Raymond Recker, and their respective wives, owned certain lands in Lawrence County, Arkansas, on which was located a rice dryer of the approximate value of $100,000.00. In accordance with a previous contract, the Recker Brothers on September 3rd, 1958, joined with their wives and executed a warranty deed to the United Enterprises, a corporation organized by petitioner, and two others. This deed was executed and delivered in petitioner's office in Paragould, Arkansas, and in return Recker's stated in substance that the petitioner had for them investments certificates in the "Investors Mutual, Inc.," the company which petitioner had represented

or was representing. Two certificates for shares in said company were given to the Reckers under the contract of purchase purporting to representing $100,000. (R. 145-160) The warranty deed was made to Columbia Company, which was a corporation owned by the Reckers. John W. Recker was a stock holder in United Enterprises, an Arkansas corporation. (R. 362-363-376)

John W. Recker and Raymond Recker were partners, in the Recker Brothers Rice Dryer, and had given a note to United Enterprises in the sum of $413,000 for stock in United Enterprises. A credit was given on the note to United Enterprises for the $100,000 consideration for the rice dryer property. John W. Recker and Exa Recker, his wife, denied signing the note for $413,000. The handwriting expert, Linton Godown testified it was their signature. (R. 405)

No evidence was offered sufficient for a finding that the petitioner defrauded the Reckers of their property and the jury on the whole of the evidence found the petitioner guilty and the court gave judgment in the amount of 11 years in the Arkansas State Penitentiary.

In affirming the conviction, the Arkansas Supreme Court, among other things, stated the question of facts was one for the jury. The Arkansas Supreme Court only specifically ruled on six of the sixty-five assignments of error, which many of those not ruled on contained constitutional questions raised in the trial court and preserved in the original trial and presented the Supreme Court of Arkansas.

3. FEDERAL QUESTION RAISED BELOW IN TRIAL COURT AND BEFORE THE SUPREME COURT OF ARKANSAS.

A. In Trial Court:

The petitioner prior to trial and after the filing of the Information filed a Motion to quash the Information, (R. 9 and 10) and stated in Item No. 6 of the Motion to quash Information that the defendant was denied a preliminary hearing at the time of his arrest and has to this date not had a preliminary hearing as entitled by the Constitution of the United States of America and the Bill of Rights and the Constitution of the State of Arkansas. The Court on May 15, 1961, overruled all points in the Motion to quash the Information including Item No. 6 pertaining to a preliminary examination. (R. 43) Where it is shown that the court stated he is going to overrule the Motion, petitioner's counsel asked for the record. I understand from the court's ruling in Case 8471, that the Court is overruling all points set forth in the defendant's Motion to quash in that case. The Court's response was that that is correct.

Likewise, petitioners Motion to quash the Information Item No. 1 (R. 9) of the Motion to quash was that the Information was not sufficient to state a cause of action to show that a public offense had been committed and Item No. 2 that the court did not have jurisdiction of any cause or matter which my be alleged in said Information. The court overruled these two items of the Motion to quash the Information (R. 43) in which the court stated that it was overruling the petitioner's Motion to quash on all points set forth in the Motion which was in fact approving an Information by the

prosecuting attorney without the petitioner having waived his rights to an indictment by the Grand Jury to which all was objected to. When the petitioner made an objection to the introduction by the State of a blank stock certificate not having any connection with the case but merely for purposes of going outside the record, counsel made the objection to the use of or referring to any blank stock certificate of any sort for purposes of identification or any other purposes. That it was prejudicial to the petitioner, and was not the best evidence under the law, that on the motion for a Bill of Particulars under the ruling of the Court, petitioner was to be furnished with copies of all instruments for the use or referral or for introduction and petitioner had not been furnished with a copy of this instrument for any purpose whatsoever. To which objection the court stated that he saw no objection to the introduction of that. (R. 147-148)

When the petitioner on cross examination asked the prosecuting witness, John W. Recker, if United Enterprises had ever paid any of his bills directly there was an objection by the Prosecuting Attorney to the petitioner inquiring into the relationship of John W. Recker, the prosecuting witness with United Enterprises. The petitioner stated that the record reflects for its self and the deed they introduced, United Enterprises was in the case and that testimony had been introduced reflecting that due to the fact the deed was made to The Columbia Co. and that the prosecuting witness was on the Board of Directors of United Enterprises and that United Enterprises had paid bills for the prosecuting witness. To which again the State objected and the court sustained the objection and refused to allow petitioner to inquire as to the prosecu-

ting witness as to his relationship with United Enterprises. (R. 176)

In petitioner's motion for a Bill of Particulars (R. 8) in Item #5, petitioner asked for detailed information pertaining to any papers, instruments in writing, checks, contracts, statements of persons, drafts, signatures, and any other thing or things purporting to show an act which would constitute a violation by the petitioner and also in a motion for subpoena duces tecum (R. 14) was shown that an amended information was filed on May 12, 1961, by the prosecuting attorney alleging the petitioner defrauded John W. Recker, Exa Recker, Raymond Recker, and Myrtle Recker, out of the real estate involved in the case. It was asked in this motion that in order for the petitioner to adequately defend himself, it is necessary that the records of the prosecuting witnesses or complaining parties be made available to the Court and jury and the defendant and to have the prosecuting witnesses subpoenaed and their records pertaining to the transactions and the records in possession of their agents, employees, bookkeepers, attorneys, or any other persons, parties, corporations of any nature all records pertaining to the transaction and any receipts or receipt purported to have been given to any of the parties by the petitioner. In response to the motion for a Bill of Particulars the Court ordered the State to furnish the instruments requested, but denied the motion for subpoena duces tecum, then it came about during the process of the trial (R. 364) which was in the hearing of the jury, although noted by the stenographer out of the hearing of the jury, which the court had given the jury a five minute recess and the jury was moving by the prosecuting attorney, the State asked that

the petitioner be directed to produce all corporate books, including the minutes, stocks list of United Enterprises and also the records and all files on the Recker's accounts for examination. To which the Court said that he thought the State was entitled to this. To which counsel for the petitioner objected strenuously and reminded the court that in the Bill of Particulars and in the motion for subpoena duces tecum that the same rights were asked by the petitioner as were now being asked by the State, and that the petitioner had been refused these rights. It was stated there that petitioner was entitled to the same rights and to as much as the State and that the petitioner had been refused this right and that the State had no greater right than the petitioner. (R. 365) After all of the argument before the Court, the Court stated I think they should be entitled to examine those that the officer of the Court will go with one of the company officials down there. (R. 366) At which time the petitioner asked for a mistrial and a directed verdict due to the fact that the Court was allowing something that they had not allowed the petitioner who had requested before trial the same right and also petitioner asked for a continuance at that time until the records of the prosecuting witnesses would be produced as to their tax records, all of their accounts, checks, drafts, bank deposits, covering the period that they did business with this corporation to which request the court overruled. Also there was a statement by the prosecuting attorney while members of the jury were standing around that he would like the Sheriff to go down there before they disappeared to which a strenuous objection was made by the petitioner in that petitioner objected to the statements and insinuations of the prosecuting atter-

ney about the disappearance of the records and also additional objections to the ruling of the Court pertaining to the production of the records. (R. 367).

Petitioner made an objection to the question of the State pertaining to an accounting as to what stock the prosecuting witnesses had in Investors Stock Fund after the petitioner had stated that he did not work for Investors Stock Fund in 1960, and the questions was pertaining to the Spring of 19[illegible], to this question there was an objection (R. 406) (R. 407) and which the court stated that he would let it be admitted. There was a further objection to this line of questioning and the admission of an accounting or some type audit not properly identified. (R. 408) And which petitioner stated that he objected to anything pertaining to Investors Stock Fund and the account of the complaining witnesses. Raymond C. Recker, Myrtle Recker as being immaterial, irrelevant, and having no bearing whatsoever upon issue before the court and could serve only for the purpose of prejudicing the jury against the petitioner on a matter totally irrelevant to the charge as brought by the State, and would ask the court for a ruling as to whether the petitioner would be permitted to ask the said prosecuting witnesses on matter concerning their relationship with Investors Stock Fund and as to amounts invested, amounts received, and would ask that all records of the Reckers as a whole regarding Investors Stock Fund or any other fund with Investors be produced so that the petitioner would have a right to inspect the same, and that any contracts, releases, notes

or other instruments entered into by and between the complaining witnesses, be produced in Court so that the petitioner would have an opportunity to inspect said records and be able to respond or answer intelligently questions propounded regarding this relationship. The petitioner was entitled to a continuance at that time until said records were produced according to the request made at that time and the motion for a Bill of Particulars (R. 408 and 409) to all of which the Court overruled the objections and requests of the petitioner.

When the petitioner asked of the prosecuting witness, Raymond Recker, when you went to Mexico there was an objection by the State as to this type of questions. The counsel for petitioner stated that they put the man's character in evidence by putting on witnesses and also stated that petitioner had a right to ask questions regarding the witnesses truthfulness and veracity, to impeach him, to go to the creditability of the witness and the court said that he thought those should have been asked him on prior cross examination. However, this was prior to the time that the character witnesses were put on when this witness was on the stand for cross examination. (R. 558) The court stated (R. 559) that at that time he is going to sustain the State's objections and which the petitioner was not permitted to go into the matter of the character and truthfulness and veracity of the prosecuting witnesses after the State had put on character witnesses on behalf of the prosecuting witness.

B. BEFORE THE SUPREME COURT OF THE STATE OF ARKANSAS:

Under the rules governing appeals in criminal cases from the Circuit Court to the Supreme Court of the State of Arkansas, the party prosecuting the appeal must file a transcript of the entire record or designated parts thereof. In this case the entire record containing all pleadings and testimony, orders and motions were contained in the transcript filed with the Supreme Court of the State of Arkansas.

In the transcript on appeal filed with the Supreme Court of Arkansas, the petitioner specified all of his grounds for the appeal and those items set out in the motion for new trial filed with the Circuit Court. The transcript of the appeal before the Supreme Court of Arkansas, is a part of the certified record of the Court below and all of that is filed herewith.

Those grounds specifying error were before the Supreme Court of the State of Arkansas, which affirmed the judgment of conviction and denied the petition for rehearing and made a written opinion as to the ruling of the Court which is appended to this petition.

That the grounds specifying error in the Supreme Court of the State of Arkansas, are set out in full in the appendix herein.

ARGUMENT

1. Certiorari should be granted in the instant case because of an important question effecting the rights of the petitioner, in the trial at State Court concerning the 5th, 6th, 14th Amendments to the United States Constitution is involved: The doctrine of preliminary hearing and the powers of indictment and information without a waiver are involved in this case and need further amplification and clarification. Overruling Petitioner's Motion to Quash the Information.

You will note that on page 9 and 10 of the transcript the Court overruled the motion to quash the information on all points and we will take up these points in this Item #1. The information filed by the deputy prosecuting attorney originally on December 8, 1960, from which a warrant was issued was not sufficient to state a cause of action or show that a public offense had been committed. The warrant that was issued as a result of this information filed by the deputy prosecuting attorney is defective in that it did not sufficiently appraise the petitioner with the charge for which he was arrested.

In addition, even in the amended information which was filed by the prosecuting attorney on May 12, 1961, just a few days prior to the time this action was tried, failed to contain the endorsement of any witnesses on behalf of the State on the said information. This was also true so far as the original information filed on December 8, 1960, and the amended information filed on May 12, 1961. It is the contention of the petitioner that certainly he should have a right to be appraised of the witnesses as the law requires and that they should be endorsed on the

information. This was specifically asked for in the motion to quash which was denied by the Court. This is also in light of the fact that a motion for a Bill of Particulars was filed prior to the trial on May 5, 1961, in which it was specifically asked that the witnesses be furnished to the petitioner or be endorsed on the information. The petitioner was put in jeopardy in violation of his rights under the laws of this State and also in violation of the 5th and 14th Amendments to Constitution of the United States and the Bill of Rights to the Federal Constitution due to the fact that the prosecuting attorney failed and refused to endorse the witnesses upon the information originally as filed by his deputy and as filed on May 12, 1961.

Section 43-1004 of the Ark. Statutes provides when an indictment is found the names of all witnesses who were examined must be written at the foot or on the indictment. The Court held in the case of *Baker vs. State* (215 Ark. 851, 223 SW 2nd 809) that the defendant cannot complain of failure of State to endorse names of witnesses on information at the time of the arrest, if State furnish such information to petitioner in open court on request of petitioner since petitioner suffered no prejudice in omission of names on information. However, that was not the case here. The witnesses were not endorsed on the original or the amended information and the petitioner specifically asked for the witnesses in his motion for a Bill of Particulars and in the motion to quash the information. The witnesses were not furnished in open court or at any other time at the request of the petitioner and petitioner feels that this certainly is prejudicial error and that the cause should be reversed on this assignment alone.

Item #6 in the motion to quash the information was

based upon the fact that petitioner was denied a preliminary hearing at the time of his arrest and had never been given a preliminary hearing and never was given a preliminary hearing as entitled by the Constitution of the United States, the Bill of Rights and the Constitution of the State of Arkansas. In the motion to quash information it states that the said petitioner was denied a preliminary hearing at the time of his arrest and had up until the time of trial at the time of his arraignment had not had a preliminary hearing as entitled to by the law.

The only case in Arkansas that can be found by petitioner is the case of Penton vs. State 194 Ark. 503, 109 SW 2nd 131, which opinion was written by the late Griffin Smith, Chief Justice, and pertains directly to the question of preliminary examination. In that case the Court stated that the preliminary examination under our Amendment Number 21 to the Constitution was not necessary. However, it was compared to a decision under the California Constitution (Art. 1, Section 8) which contained the following provisions: "Offense heretofore required to be prosecuted by indictment shall be prosecuted by information, after examination and commitment by right of Magistrate, or by an indictment, with or without said examination and commitment as may be subscribed by law." This, of course, is not mentioned in Amendment #21 to the Constitution of the State of Arkansas which gives the prosecuting attorney equal authority with the Grand Jury, but under the same rules and restrictions of a Grand Jury, pertaining especially to matters of procedure, to filing information in place of an indictment and charge a defendant with a crime.

However, the decision of Penton vs. State supra, was

never appealed to the Supreme Court of the United States so far as the Appellant has been able to determine. We feel that this is very important in that this petitioner was denied a preliminary hearing which we state is guaranteed under the due process clause of the Federal Constitution.

Especially since the prosecuting attorney failed and refused to endorse witnesses on the information the petitioner certainly should be appraised in some manner or other as to those witnesses who would appear against him and certainly is entitled to know before hand either by endorsement of witnesses, or response to the motion for a Bill of Particulars in which the witnesses were requested, or by preliminary examination, to know exactly what witnesses he is to be confronted with in order to adequately prepare for his defense. Which in this case it was impossible for the petitioner to do so, due to said errors as alleged and due to the fact he was denied a preliminary examination, and the failure to endorse witnesses, and the Court's overruling and denying the motion for a Bill of Particulars respecting the witnesses to be used by the State.

Overruling the Motion for a Bill of Particulars.

The Court errored in overruling and denying petitioner's motion for a Bill of Particulars in that the Petitioner was entitled to detailed information as to the affidavit for warrant of arrest and contents thereof, another matter set forth in the Bill of Particulars, or that is the motion for a Bill of Particulars. That the motion for a Bill of Particulars was denied by the Court except that the Court ordered the State to furnish the petitioner with

a copy of the receipts and a copy of a deed that was to be introduced but the petitioner had asked for all instruments which would be introduced in evidence or copies thereof to be furnished to the petitioner prior to trial.

All of these things of course were set forth in the motion for a Bill of Particulars (R. 8). The petitioner was entitled to information as to the affidavit for warrant of arrest and contents thereof. That this was refused by the Court. It later developed in the trial the exact thing that was anticipated by the petitioner, in that over objections of the petitioner, the State was allowed to introduce copies of other checks and other instruments in writing reported to be used directly or indirectly by the State against this petitioner. The petitioner had asked that copies of these matters or other documents be shown to him or copies supplied and as previously stated this was denied by the Court with the exception of the receipts and the deed.

The motion for a Bill of particulars as previously stated, also the Petitioner asked for witnesses which would be used on behalf of the State and statements held by the State from any of the witnesses, which was denied by the Court. Also was asked for details of acts performed by the Petitioner at any time which would constitute a violation of any criminal law, either by Statute or by common law as alleged in the information as to the time, place and any other acts performed. This was denied by the Court over the objections of the Petitioner.

The motion for a Bill of Particulars asked again detailed information pertaining to any papers, instruments in writing, checks, contracts, statement of persons, drafts,

signatures, and any other thing or things proposing to show an act which would constitute a violation by this petitioner. This also was denied by the Court. Later the Court allowed the State to use other instruments over the objections of the petitioner when he had specifically asked in the Bill of Particulars for information pertaining to these things which was denied by the Court and petitioner states this definitely constitutes an error and denies him his right to due process under the 14th Amendment to the Constitution of the United States Article 5 of the Consfitution of the United States and the 1st ten amendments to the Constitution of the United States and the Constitution of the State of Arkansas. In fact, the Court allowed the State under a Subpoena Duces Tecum to bring into the record many things which were irrevelant and immaterial and served only to prejudice the jury when in fact (R. 14) the petitioner had filed a motion for a Subpoena Duces Tecum. Of course a Subpoena Duces Tecum can be issued only by order of the Court and this motion was filed by petitioner prior to trial asking for these particular things and for the Court to issue a Subpoena Duces Tecum which the Court denied. As previously stated later in the trial the Court allowed the State to issue a Subpoena Duces Tecum for books and records which is in direct conflict with the specific thing asked by the petitioner prior to the time of trial since it was material to the defense to give the jury an entire picture of the transactions between the petitioner and the complaining witnesses. It was anticipated by the petitioner that certain other matters could or would possibly be brought into the record and in order to adequately defend himself it was necessary that he have a motion for Subpoena Duces Tecum filed and that

a Subpoena Duces Tecum be issued to bring into Court records of the complaining witnesses to show the true transactions between the parties.

Refusing to Excuse Members of Jury Panel Who Were Either Called and Questioned or Actually Served on the Jury During the Same Term of Court in Which this petitioner was Previously Tried.

(Tr. 83) The Petitioner asked the Court to excuse those jurors who were called on voir dire examination and were actually serving on the jury on the other case during this same term of Court in which this petitioner was tried. The Court agreed to excuse those who actually served on the jury, however, the petitioner feels that his rights were prejudiced and that it was prejudicial error to call any of those who were even subjected to voir dire examination and were excused for cause or struck by the State or petitioner in the prior case in this same term of Court.

Permitting the State to Refer to a Stock Certificate in Blank.

(R. 147) The Court errored in permitting the State to refer on direct examination of John Recker to a stock certificate in blank for any sort of purposes for identification or for any other purposes. That it was highly prejudicial to the petitioner and not the best evidence under the law and was not furnished in response to the bill of particulars filed by petitioner and a copy thereof not having been furnished to the petitioner in response to the motion for a bill of particulars. It was not the best evidence under the law and that on the motion for a bill of particulars under the ruling of the Court petitioner was

to be furnished with copies of all instruments for use or referal or for introduction. Also was asked on the motion for subpoena duces tecum for records and copies of things in the possession of the complaining witness which was not furnished and the Court allowed the State to have a subpoena duces tecum issued to bring in records of United Enterprises over the objections of the petitioner.

Refusing to Permit the petitioner to Question the Prosecuting Witness, John Recker, Pertaining to his Relationships With United Enterprises.

That the Court errored in not permitting counsel for the petitioner to ask the witness, John Recker, questions pertaining to his relationship with United Enterprises, which questions were propounded on cross examination of this witness and in particular the witness would have testified had he been permitted to answer the questions that he held a telephone credit card on United Enterprises, and used this card constantly and even after the dates of the execution of this deed and after the date of March, 1960, in which he alleged that he finally realized this petitioner was to defraud him of his property, that the United Enterprises paid insurance on the witness's airplane and paid other bills and accounts for this witness, which matters were very material to the issues in this case and should have been submitted to the jury in order that the jury would have a complete picture of the various transactions. In denying the jury this information the petitioner was thereby prejudiced in the minds of the jury and his rights were prejudiced in denying the omission of this testimony. (R. 177)

Permitting the State to Subpoena Records of United Enterprises.

That the Court errored in permitting the State to subpoena the records of United Enterprises over the objections of the petitioner in that the petitioner in his bill of particulars asked for the records of Raymond Recker and John Recker petraining to the transactions of this rice drier and were refused by the Court and in allowing the State to do the same thing that the petitioner was not permitted to do would be going entirely out of the record. Petitioner is entitled to as much as the State and since the petitioner was refused the State had no right to ask the same thing and the State was allowed the privilege denied this petitioner even though the petitioner was the one on trial which would certainly be an infringement upon his constitutional rights under the State of Arkansas and under the Constitution of the United States pertaining to the due process and other matters. When has the law so provided that the State is given benefits and additional rights under the law more than the petitioner. The Appellate Court can note on (R. 8) a motion for a bill of particulars was filed prior to the trial asking for matters such as those asked for by the State. Also, the Appellate Court will note that on page 14 of the Record there appears a motion for subpoena duces tecum asked for by this petitioner. This asked for certain records pertaining to the rice drier transactions which motion was refused by the Court. Now the Court came along and gave the State the right to issue a subpoena duces tecum for records pertaining to the rice drier transactions. (R. 364, 365, 366)

Refusing to Grant a Mistrial After Allowing the State to Subpoena Records of United Enterprises

That the Court errored in refusing the petitioner a mistrial after the Court's order allowing a subpoena on behalf of the State to be issued for the records, and also errored in refusing to grant the petitioner a directed verdict and also errored in refusal of a continuance to the petitioner until such time as the accounts, checks, drafts, bank notes, bank deposits and other records of the complaining witnesses would be produced. This point is pretty well discussed in the prior argument in which it was set out that there had been a motion for a bill of particulars and a motion for a subpoena duces tecum made prior to the Court's allowance of the State's motion for a subpoena duces tecum which prior motions had been made by the petitioner and refused by the Court. (R. 367)

That the Remarks of the Prosecuting Attorney in That We "Would Like the Sheriff to go Down There Before They Now Disappear" Pertaining to the Records of the United Enterprises Was Highly Prejudicial, was Unwarranted, Without Merit and Could Only Tend to Inflame the Minds of the Jury.

Permitting the Prosecuting Attorney to Examine the Petitioner Regarding an Audit or Accounting of Investors Certificates.

That the Court errored in permitting the State to examine the petitioner regarding an audit or accounting of some Investors Certificates and as the matter was immaterial, irrevelant and had no bearing whatsoever on

the issues and could only serve the purpose of prejudicing the jury against the petitioner on matters totally irrevelant to the charge brought by the State. Further, the Court had denied the petitioner the right to cross examine the complaining witnesses regarding their transactions with this Investors Stock Fund and these matters are contained in this audit to which the State is referring and the Court further errored in denying the petitioner the right to have produced all records of the complaining witnesses as a whole regarding the Investors Stock Fund or any other fund with Investors. The Court further errored in denying the petitioner at that time a continuation of the cause until the records of the complaining witnesses were produced at the request made in the bill of particulars and at other times during the course of the trial and in particular on the motion for subpoena duces tecum. (R. 402, 403)

The Court will note that this was obviously immaterial and irrevelant and had no bearing whatsoever upon the issues before the Court and could only serve for the purpose of prejudicing the jury against the petitioner on a matter totally irrevelant to the charges brought by the State. At that time the petitioner asked the Court for a ruling as to whether the petitioner would be permitted to seek information from the prosecuting witnesses on matters concerning their relationship with Investors Stock Fund and as to amounts invested, amounts received, and also asked at that time that all records of the prosecuting witnesses regarding the Investors Stock Fund or any other fund with Investors be produced so that the petitioner could have a right to inspect the same, and that any contracts, releases, notes or other instruments entered into

by and between the complaining witnesses be produced in Court so that petitioner would have an opportunity to inspect the records and be able to respond or answer intelligently question propounded regarding this relationship. That the petitioner was entitled to a continuance until the records were produced according to request made at the time the questions were asked and the motion for a bill of particulars as previously filed and the motion for subpoena duces tecum as previously filed. (R. 408 and 409) The Court permitted the State to introduce account ananlysis which was prejudicial to the petitioner but denied specifically the right of the petitioner to have records of the prosecuting witnesses pertaining to the stock fund transactions persented to offset the insinuations or presumptions made by the State through the introduction of irrevelant and immaterial matters in the minds of the jury. To do what the Court did would be to deny the petitioner his rights under the due process of law regarding his rights to have before the Court and jury evidence in his own behalf which is guaranteed by law.

Therefore petitioner respectfully requests that a writ of certiorari issue to the Supreme Court of the State of Arkansas.

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APPENDIX

SUPREME COURT OF ARKANSAS

No. 5026

ARNOLD E. EDENS ..... Appellant

v.

STATE OF ARKANSAS ..... Appellee

Opinion Delivered — May 28, 1962

Apeal From Greene Circuit Court

AFFIRMED

ED. F. McFADDIN, Associate Justice

(Justice Ward Not Participating)

Arnold Edens was convicted of the crime of obtaining property by false pretense (§41-1901 Ark. Stats.); and he prosecutes this appeal. The record is voluminous, and the motion for new trial contains sixty-five assignments, all of which are presented in the appellant's brief and have been studied. We group and discuss them.

I. *Preliminary Matters.* A number of assignments relate to such preliminary matters as the signature on the information, a bill of particulars, endorsing the names of the witnesses on the information, motion for continuance, amount of bail, etc., etc.; but we find no merit in any of these. The Prosecuting Attorney signed and filed an amended information which gave the defendant all the particulars that the law requires. Copies of certain exhibits were furnished the defendant, and the list of State witnesses was given to him. The defendant was not entitled

to receive copies of the statements that the Prosecuting Attorney had obtained from the various witnesses for the State, as this was a part of the Prosecuting Attorney's work papers. Furthermore, we have held that the Discovery Statute (Act No. 335 of 1953) does not apply to criminal cases. *Bailey v. State*, 227 Ark. 889, 302 S. W. 2d 796. The Trial Court did not abuse its discretion in the rulings on any of these so-called preliminary matters.

II. *Jurors.* The appellant claims several errors as to method of calling jurors, making up the panel, etc., etc.; but we find no error. The only matter meriting discussion is the claim that the Court erred in holding that Mr. Woolard was qualified; but we consider any error in this ruling to be harmless because of the condition of the record. Woolard had served as a juror within the previous two years and such service made him ineligible to serve at the time of this trial. (Act No. 205 of 1951, as now found in §39-225 Ark. Stats.) The Court held that such disqualification of Woolard could be waived by Woolard's failure to claim such privilege. (1) We think the 2-year disqualification under Act No. 205 of 1951 is mandatory, and not something that the individual juror can waive. But the Court's ruling as to the juror, Woolard, constituted harmless error. The record shows that the appellant excused Mr. Woolard by exercising one of the defendant's eight peremptory challenges allowed by statute (§43-1922 Ark. Stats.); and we fail to find in the record that appellant was forced to be tried by any disqualified juror.

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(1) As regards jurors over 65 years of age being allowed to be excused from jury service, that is a personal privilege which the juror can waive (Sec. 39-104 Ark. Stats.); and, here, no juror over 65 years of age claimed his personal privilege to be excused.

III. *Sufficiency Of The Evidence.* On appeal, we must view the evidence in the light most favorable to the jury verdict. (Eddington v. State, 225 Ark. 929, 286 S. W. 2d 473; and *Carnal v. State*, 234 Ark. (adv. op.) 1050, ——— S. W. 2d ———. So viewing it, the State proved the following facts now to be recited: John W. Recker and Raymond Recker owned certain lands in Lawrence County on which was located a rice dryer of the approximate value of $100,000.00. In accordance with a previous contract the Recker brothers on September 3, 1958, joined with their wives and executed a warranty deed to the United Enterprises, a corporation organized and dominated by the appellant, Arnold Edens. This deed was executed and delivered in Edens' office in Paragould, upon his representation to the Reckers that he had for them investment certificates in the "Investor's Mutual, Inc.", a company which Edens said he represented. Edens exhibited to the Reckers two certificates for shares in "Investor's Mutual, Inc." One was Certificate No. 22392055 to J. W. Recker and Exa Recker, his wife, and the other was Certificate No. 22392054 to Raymond Recker and Myrtle Recker, his wife. But Edens told the Reckers that "Investor's Mutual, Inc." had issued the certificates for twice as many shares or interests as the Reckers were entitled to receive, and that he would return the certificates to "Investor's Mutual, Inc." for reissuance for the correct number of shares or interests, and the corrected certificates would be delivered. Edens signed and gave to the Reckers a receipt which read: "Sept. 3, 1958. Received from John W. Recker & Exa A. Recker, No Cash — Dollars — Cert. #22392055 5056.00 Investors Mutual. (Signed) Arnold E. Edens, Zone Mgr. 5211, Investors Diversified Services, Inc."

The Reckers never received any certificate of any kind for shares or interests in Investor's Mutual, Inc.; and it was testified by an auditor for Investor's Mutual, Inc. that the Company had never issued a certificate with numbers like those on Edens' receipt, and that the Company had never issued certificates like those which Edens exhibited to the Reckers. In short, the certificates exhibited by Edens to the Reckers were forgeries.

The evidence already detailed, if believed, would establish that Edens obtained the deed from the Reckers on September 3, 1958 by representing and exhibiting to them two papers which he said were valid certificates, but which were in fact forgeries, and void and of no value. It was further testified that Edens never returned the deed to the Reckers. Three of our more recent cases, involving this false pretense statute, are *Anderson v. State*, 226 Ark. 493, 290 S. W. 2d 846; *Karr v. State*, 227 Ark. 777, 301 S. W. 2d 442; and *Kerby v. State*, 233 Ark. 454, 342 S. W. 2d 412. In accordance with the rules of these and other cases, we conclude that the evidence was sufficient to support a conviction under §41-1901 Ark. Stats., (2) which reads:

> "*Obtaining personal property by false pretense. Penalty.* Every person who with intent to defraud or cheat another, shall designedly by color of any false token or writing, or by any other false pretense, obtain a signature of any person to any written instrument, or obtain from any person any money, personal pro-

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(2) The statute was amended by Act No. 111 of 1959; but the date of the offense here charged was September 3, 1958; and we have a statute which provides that the subsequent repeal of a statutory offense does not affect the prosecution under the law as it existed at the time of the offense (Sec. 1-104 Ark. Stats.)

perty; right of action, or other valuable thing or effects whatever, upon conviction thereof, shall be deemed guilty of larceny, and punished accordingly.

Edens claimed that all of this September 1958 deed and certificate matter was done by him merely to favor the Reckers in their income tax problems with the United States Government; that the United Enterprises, Inc. held John W. Recker's note for $413,000.00; that in 1959 the corporation did in fact receive a deed conveying the rice dryer property; and that the United Enterprises then duly credited the Recker note with $100,000.00. *John W. Recker denied that he had ever signed any such note for $413,000.00; and that became a disputed issue in the case.* But such explanation by Edens was a matter for the jury to decide. The jury chose to believe the Reckers' version of the transaction; and we must conclude that the evidence is sufficient to sustain the verdict of conviction.

IV. *Rulings At To Evidence.* A large number of appellant's assignments relate to the Court's rulings as to admitting or excluding evidence, form of questions, etc., etc. We have carefully examined all of these assignments and find no reversible error. We mention only a few. Assignment No. 16 relates to the refusal of the Court to permit the appellant to question the prosecuting witness, John Recker, pertaining to his relationships with the United Enterprises. When the Court originally refused this cross-examination, the appellant made an offer to prove what the witness would testify. Later, in the course of the

trial, John Recker was recalled and was then cross-examined as to moneys received from United Enterprises, the use of a telephone credit card, the insurance on his airplane, and various other matters which were in the previous offer of proof. Therefore, the appellant finally obtained his claimed right of cross-examination, and the first ruling was overcome.

Assignments 49, 50, and 51 relate to questions that the Prosecuting Attorney asked the defendant when he was on the witness stand. The Prosecuting Attorney inquired: "I will ask you, going to your credibility, if you did not defraud Mrs. Kelly Winfred Recker, a woman 72 years of age, out of $7,000.00." Similar questions were asked concerning three other persons. In each instance the defendant answered that he did not defraud such named person, and that ended the inquiry. We find no error committed in the Court's rulings in these matters. When a defendant takes the witness stand in his own behalf in a criminal trial, he submits himself to correct questions that may be asked him on cross-examination to test his credibility. *Hunt v. State*, 114 Ark. 239, 169 S. W. 773; and *Castle v. State*, 229 Ark. 478, 316 S. W. 2d 701. The questions here propounded went to the credibility of the witness. But when the defendant answered in the negative the inquiry stopped, and there was no effort to impeach him on these answers. So no error was committed in these matters.

Assignment 53 in the motion for new trial relates to

the ruling of the Court in permitting the State to introduce character witnesses to support the reputation of the prosecuting witnesses. This occurred in the State's rebuttal. Assuming without deciding that the character and reputation of these witnesses had not been put in issue, nevertheless, a careful study of the record fails to disclose any objection or exception made by the defendant to the testimony of any of these character witnesses. So there are no exceptions on which to base these assignments.

V. *Ruling On The Motion For New Trial.* In the motion for new trial, the defendant, *inter alia*, sought to bring in the testimony of Mr. Linton Godown, a handwriting expert of Memphis, Tennessee, to show that the witness John W. Recker had in fact signed the note for $413,000.00 to the United Enterprises. The Trial Court overruled the motion for new trial and the appellant claims that reversible error was thereby committed. We see no error in this regard because the testimony of Mr. Godown to support the motion for new trial was cumulative of the evidence that the defendant had offered on this same point in the trial in chief. Many pages in the record in the trial in chief are concerned with the testimony as to whether John W. Recker signed the $413,000.00 note. What was said in *Sellers v. Harvey*, 220 Ark. 541, 249 S. W. 2d 120, is entirely apropos here:

> "This court has consistently applied the following rules in considering an application for a new trial on the ground of newly discovered evidence under

the seventh sub-division of Ark. Stats., §27-1901; First, the testimony must have been discovered since the trial; second, it must appear that the new testimony could not have been obtained with reasonable diligence on the former trial; third, it must be material to the issue; fourth, it must go to the merits of the case, and not to impeach the character of a former witness; fifth, it must not be cumulative. *John Robins v. Absalom Fowler*, 2 Ark. 133; *Mo. Pac. Transportation Co. v. Simon*, 200 Ark. 430, 140 S. W. 2d. 129.

"Another settled rule is that the motion is addressed to the sound discretion of the court and this court will not reverse for failure to grant it unless an abuse of such discretion is shown. *Forsgren v. Massey*, 185 Ark. 90, 46 S. W. 2d 20."

VI. *Other Assignments.* As heretofore stated, the motion for new trial contains 65 assignments. To discuss each of them would unduly prolong this opinion. It is sufficient to say that we have carefully studied all of them, and find none to possess merit.

Affirmed.

GROUNDS SPECIFYING ERROR IN SUPREME COURT OF ARKANSAS

1. Overruling petitioner's motion to quash the information.
2. Overruling motion for bill of particulars.
3. Overruling motion to reduce bond.
4. Overruling petitioner's motion for continuance.
5. Overruling petitioner's motion to squash special second list of petit jurors.
6. Refusing to excuse Mr. Woolard from jury panel.
7. Refusing to excuse Mr. McBride from jury panel.
8. Refusing to excuse members of jury panel who were either called and questioned or actually served on the jury during the same term of Court in which petitioner was previously tried.
9. Refusing to excuse jurors who were called on voir dire examination and were excused for cause or struck by State or petitioner in prior case in the same term of court.
10. Refusing to call jurors in regular sequence.
11. Permitting the State to refer to a stock certificate in blank.
12. Permitting the introduction of a receipt noted as State's Exhibit 1.
13. Permitting the State to ask the question "Would you have executed this deed if it had not been

for the representations of this petitioner over here"?

14. Permitting the State to introduce a certified copy of the deed.

15. Permitting the State to ask leading questions of the prosecuting witness.

16. Refusing to permit the petitioner to question the prosecuting witness, John Recker, pertaining to his relationships with United Enterprises.

17. Permitting the State to introduce a warranty deed.

18. Permitting the State to ask leading questions of the prosecuting witness, Exa Recker.

19. Permitting the State to ask the question of the prosecuting witness, Exa Recker, "Did you get one red cent?"

20. Refusing to permit the petitioner to ask the prosecuting witness, Exa Recker, about monies received from Investors' Mutual.

21. Permitting the State to introduce a receipt purportedly given to the prosecuting witness, Raymond Recker.

22. Permitting the State to ask leading questions of the witness, Raymond Recker.

23. Permitting the State to ask leading questions of of the witness, Raymond Recker.

24. Refusing to permit the petitioner to question the prosecuting witness, Raymond Recker, regarding monies received from investors.

25. Permitting the State to introduce a receipt showing the assumption of tax liability of prosecuting witnesses.

26. Permitting the State to ask leading questions to the prosecuting witness, Myrtle Recker.

27. Permitting the State to ask highly prejudicial questions of the prosecuting witness, Myrtle Recker.

28. Refusing to grant a mistrial to the petitioner on the basis of questions asked by the prosecuting attorney.

29. Refusing to grant the petitioner a mistrial at the close of the State's case.

30. In refusing at the close of the State's case a directed verdict in favor of the petitioner.

31. Refusing to permit petitioner to present evidence regarding income tax returns of prosecuting witnesses.

32. Permitting the State to ask highly prejudicial questions of witness, Betty Laffoon.

33. Permitting the State to ask witness, Betty Laffoon, highly prejudicial questions.

34. Permitting the State to ask highly prejudicial questions of the witness, Betty Laffoon.

35. Refusing the petitioner the right to introduce evidence regarding title insurance on the rice drier property.

36. Permitting the State to subpoena records of the United Enterprises.

37. Refusing to grant a mistrial after allowing the State to subpoena records of United Enterprises.

38. In refusing a mistrial after remarks made by the State's attorney before the jury.

39. In permitting the State to question the petitioner regarding a $11,000 check to Raymond Recker.

40. Permitting the prosecuting attorney to examine the petitioner regarding an audit or accounting of Investors certificates.

41. Permitting the State to examine the petitioner regarding audits of accounts of the prosecuting witness.

42. Permitting the State to introduce audit report.

43. Permitting the State to introduce evidence of an account analysis.

44. Permitting the State to introduce evidence of an account analysis.

45. Permitting the State to ask questions pertaining to a blank stock certificate.

46. Permitting the State to examine the petitioner pertaining to stock certificates.

47. Permitting the State to examine the petitioner regarding a photostatic copy of some purported stock certificates.

48. Permitting the State to examine the petitioner regarding an instrument entitled Anrold E. Edens and Nancy W. Edens

49. Permitting the State to examine the petitioner regarding business transactions with one Mrs. Kelley Recker

50. Permitting the State to examine the petitioner regarding business transactions with a Dr. Harper.

51. Permitting the State to examine the petitioner regarding highly prejudicial statements of the prosecuting attorney pertaining to the petitioner's next door neighbor

52. Permitting the State to examine the witness Dr. McKelvey regarding State's Exhibit 12, 13, and 14

53. Permitting the State to introduce character witness on behalf of the prosecuting witness

54. Refusing to allow the petitioner to examine the prosecuting witness Raymond Recker regarding his credibility or character.

55. In giving Instruction No. 1.

56. In giving Instruction No. 2.

57. In giving Instruction No. 3.

58. In refusing to give petitioner's requested Instructions, 1 through 16.

59. In the failure of the prosecuting attorney to follow the orders of the court in returning the note for $413.000

60. In failing to set aside the verdict or give a directed verdict due to prejured testimony on behalf of of the complaining witne ses, regarding signatures on the $413,000 note and other signatures.

61. In calling the jury back into the jury box and giving instructions.

62. In refusing to grant a new trial due to statements previously made by one of the jurors.

63. In allowing the State to use witnesses not endorsed on the information.

64. That the verdict was contrary to the law on the preponderance of the evidence.

65. That the sentence imposed by the court was completely out of line according to the law and evidence.